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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JOEL SCOTT McNEARNEY,	:	Case No. 20090463-CA
Defendant/Appellant.	:	Appellant is not incarcerated.

BRIEF OF APPELLANT

Appeal from a conviction of one count of burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (2008). in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Deno Himonas, presiding.

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for one count of burglary, a second felony, in violation of Utah Code Ann. § 76-6-202 (2008), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Deno Himonas, presiding. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78A-4- 103(2)(j) (2008). See Addendum A (Sentence, Judgment, Conviction).

STATEMENT OF THE ISSUES, STANDARDS OF REVIEW, PRESERVATION

I. Whether the trial court erred in denying a motion for a directed verdict to amend the second degree burglary of a dwelling offense to a third degree burglary of a building, where the structure at issue did not meet the statutory definition of a "dwelling."

Standard of Review: Whether the trial court erred in denying the motion for directed verdict is a question of law reviewed for correctness "giving no particular deference to the trial court's legal conclusions." State v. Hirschi, 2007 UT App 255, ¶ 15, 167 P.3d 503(citation omitted). Whether the trial court properly interpreted a statutory term is a

question of law reviewed for correctness. State v. Barrett, 2005 UT 88, ¶ 14, 127 P.3d 682.

Preservation: This issue was preserved in the Defendant's Motion for a Directed Verdict. R. 124:98-102, 148-49.

II. Whether the trial court erred in failing to instruct the jury on the lesser offense of burglary of a building, a third degree felony, denying Mr. McNearney his right to present to the jury his theory of the case.

Standard of Review: "When considering whether a defendant is entitled to a lesser included offense jury instruction, [this Court will] 'view the evidence and the inferences that can be drawn from it in the light most favorable to the defense.'" State v. Spillers, 2007 UT 13, ¶ 10, 152 P.3d 315 (citation omitted). Furthermore, when a lesser included offense instruction is requested by defense, "the requirements for inclusion of the instruction 'should be liberally construed.'" Id. (citation omitted).

Preservation: This issue was preserved. R. 124:147-50.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions are relevant to the issue on appeal and set forth at Addendum B: Utah Code Ann. § 76-6-202 (2008).

STATEMENT OF THE CASE

Mr. McNearney was charged by Information on January 17, 2008 with burglary, a second degree felony; theft, a class B misdemeanor; and, unlawful possession of burglary tools, a class B misdemeanor. R. 1-3. A preliminary hearing was held on April 22, 2008 where Mr. McNearney was bound over on all counts. R. 23-24; 30:52. The trial court

granted defense counsel's motion in limine to exclude evidence of Mr. McNearney's prior criminal record. R. 63-66; 124:1-6. On March 4, 2009, a jury trial was held. R. 124. The state and defense counsel stipulated to the admissibility of "a bag with some tools . . . and evidence of some toilet screw caps, a key, and also evidence . . . alleging" the key was stolen. R. 124:6. Based on the stipulation, the state dismissed the theft and unlawful possession of burglary tools charges. R. 124:6.

At the conclusion of the state's case, defense counsel made a motion for a directed verdict to change the burglary of a dwelling count, a second degree felony, to burglary of a building, a third degree felony. R. 124:98. The trial court denied the motion. R. 124:102. The trial court also denied defense counsel's request to give the lesser included jury instruction of burglary of a building. R. 70; 124:148-50. The trial court refused to allow defense counsel to argue to the jury that Mr. McNearney did not enter into a "dwelling" as defined by statute. R. 124:150-53.

The jury found Mr. McNearney guilty of second degree burglary. R. 60, 105-07;124:197. On May 1, 2009, Mr. McNearney was sentenced to an indeterminate term of not less than one year and no more than fifteen years in the Utah State Prison. R. 113-14. The trial court suspended the prison sentence and placed Mr. McNearney on supervised probation for 36 months with Adult Probation and Parole. R. 113-14. On May 28, 2009, a timely notice of appeal was filed. R. 115-16.

STATEMENT OF FACTS

Mr. Joel McNearney was charged with burglary, a second degree felony; theft, a class B misdemeanor; and, unlawful possession of burglary tools, a class B misdemeanor. R. 1-3. A jury trial was held on March 4, 2009. R. 124.

Brent Roberts, testified that he had built a house next door to the home he was living in and had placed it on the market for sale. R. 124:29, 41. The house had been on the market for about four months and had a for sale sign out in front. R. 124:30, 41. The house was located in a subdivision surrounded by "a lot of empty lots" with only a few homes built at that time. R. 124:41. The area was undeveloped and sidewalks were not put in at the time. R. 124:86, 88. The house contained a heating and cooling system, and standard appliances except for a refrigerator. R. 124:30. A key box was placed on the front doorknob of the house for realtors to access when they were showing the house to prospective buyers. R. 124:31.

On January 6, 2008, after going over to the house to turn on some lights, Mr. Roberts noticed the key box was missing and the front doorknob had been smashed. R. 124:31. Mr. Roberts reported the missing key box to the police. R. 124:32. Officer Kevin Peck came out to the house around 7:00 p.m. and walked through the house with Mr. Roberts and they determined that nothing had been damaged or disturbed. R. 124:32, 45-46. Officer Peck left Mr. Roberts his card and told him to call if he saw anything suspicious. R. 124:33, 46. After talking with his son, Mr. Roberts decided to put a baby monitor in the house so he would hear if anything happened. R. 124:33, 46-47. The baby monitor was place in the kitchen at the rear of the house on top of a cupboard. R.

124:42. At about 9:30 p.m. that same night Mr. Roberts heard doors opening, "stuff moving around," and voices coming from inside the house on the baby monitor. R. 124:34. Mr. Roberts called Officer Peck and told him that he could hear voices inside the house. R. 124:36, 47.

Officer Chris Combs was the first to arrive at the house and he and Mr. Roberts entered the house. R. 124:36, 49, 93. Officer Peck advised Combs that he would try to get a visual of the back of the house. R. 124:50. Once Peck could see the back of the house, he noticed two figures wearing dark clothing beginning to run from the house. R. 124:51, 93. Peck notified Combs and other officers responding to the area that two individuals were running from the back of the house. R. 124:51, 93. Peck pursued the individuals first in his vehicle and then on foot. R. 124:52-53, 93. Eventually, Peck was able to yell out "police" and give commands to the individual closest to him, Joel, to get down on the ground. R. 124:56. Joel responded to Peck's commands and was arrested. R. 124:56-57. Officers were unable to locate the second individual. R. 124:64. Upon searching Joel, Peck found a set of keys, a single key, a headlamp, cell phone, his identification and white plastic caps. R. 124:58, 60-61, 123-24. At the house, Officer Peck also found a bag of tools, consistent with tools use for burglaries, about 20 feet from the back of the house that appeared to have been dropped. R. 124:70-74. Peck asked Officer Combs to take the key found on Joel back to the house and see if it unlocked the front door, which it did. R. 124:94-95.

Mr. Roberts testified that when he entered the house he could see the sliding door at the back of the house was open. R. 124:36. As Mr. Roberts and Officer Combs

entered the master bathroom, they could see that the toilet had been removed off of the pipe and there were nuts and bolts lying on the floor. R. 124:36-37, 39, 94. In another bathroom it appeared that the toilet had just started to be removed. R. 124:37, 39. The toilet screw caps were missing from the master bathroom but not from the other bathroom. R. 124:38-40.

After the state rested, defense counsel made a motion for a directed verdict to change count I from burglary of a dwelling, a second degree felony to burglary of a building a third degree felony. R. 124:98. Defense counsel argued that because this house had never been occupied it did not fit within the statutory definition of a dwelling. R. 124:98-99, 101-02. The trial court denied the motion. R. 124:102.

Next, Joel testified that he was employed doing remodeling type of construction which consists of upgrading homes, from sheetrock to plumbing, and all the fixtures. R. 124:103-04. Joel worked with a guy named Preston, serving as his AA sponsor for six months, and occasionally allowing Preston to work as a laborer for him on his construction projects. R. 124:107-08. Preston worked with Joel on his current construction project and Preston told Joel that he had a couple of toilets to finish the house they were working on. R. 124:109-10. Joel went to Preston's to pick up the toilets and Preston told him that he needed a ride to pick the toilets up. R. 124:110. Although Joel was suspicious of Preston's claim when they arrived at the house, Preston told Joel that the toilets were legitimate. R. 124:112.

Preston told Joel to wait for him at the back door while he went to the front of the house and let himself inside. R. 124:113. Preston then opened the back door and told

Joel to come inside, but Joel refused. R. 124:117. Joel told Preston he wanted to leave but Preston told him to relax, that it was all right. R. 124:118. Preston continued to talk to Joel but Joel could not see Preston inside the house because it was dark. R. 124:120, 135. At some point Preston came out of the house in a hurry yelling "police," and "the cops are here," and ran into Joel waiting at the back door. R. 124:121-22, 138. Preston handed Joel some things which he put in his pockets as he panicked and started to follow after Preston. R. 124:121-22, 139. When Joel heard the police officer tell him to stop, Joel stopped and did as the officer directed him to do. R. 124:123. Joel was placed into custody and searched. Officers found among other personal items, toilet caps and the key to the front door of the house. R. 124:123-24.

After the defense rested, the trial court addressed counsel, outside the presence of the jury, regarding a defense proposed jury instruction it would not give. R. 70;124:147. First, the trial court indicated that it denied the motion for directed verdict based on its interpretation of case law that the statute does not require "that a dwelling actually be inhabited, only that the purpose for which the dwelling is created is that it be habitable." R. 124:148. Defense counsel objected to the trial court's interpretation of "usually occupied" under the statute. R. 124:149. Based on the trial court's interpretation of the statute, it denied defense counsel's request for a lesser included instruction for burglary, a third degree felony. R. 124:149. The trial court also denied defense counsel's request to give a lesser included jury instruction on criminal trespass. R. 124:150. The trial court also denied defense counsel the ability to argue to the jury that the house in question did

not meet the statutory definition of a dwelling. R. 124:150-53. The trial court instructed the jury on its interpretation of a dwelling and the term "usually occupied." R. 124:167.

The jury convicted Mr. McNearney of burglary, a second degree felony. R. 60;124:197. The trial court sentenced Mr. McNearney to an indeterminate term of not less than one year and no more than fifteen years in the Utah State Prison. R. 113-14. The trial court suspended the prison sentence and place Mr. McNearney on supervised probation for 36 months with Adult Probation and Parole. R. 113-14.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Mr. McNearney's motion for a directed verdict to amend the charged offense of burglary of a dwelling, a second degree felony, to burglary of a building, a third degree felony. Under Utah law, a newly built vacant house that has never been occupied as a residence does not fit the statutory definition of a "dwelling" as that term is defined within the burglary statute. Rather, the statute and case law support that a building becomes a dwelling house when it is occupied and used for the purpose of sleeping. An uninhabited house simply does not implicate the same concerns for privacy that the second degree burglary statute seeks to provide. The trial court's interpretation of a "dwelling" was therefore erroneous and it erred in failing to grant the directed verdict.

The trial court failed to instruct the jury on the lesser included offense of burglary of a building and denied Mr. McNearney his right to argue that the house in question was not a "dwelling" as that element is defined within the burglary statute, thus denying Mr. McNearney his right to present the jury with his theory of the case. Mr. McNearney was

entitled to his requested lesser-included offense jury instruction where the elements for the offenses of burglary of a dwelling and burglary of a building overlap and the evidence provided a rational basis for the jury to acquit him of the greater offense and convict him of the lesser. Because whether the house in this case was "dwelling" is an element that must be proven beyond a reasonable doubt, Mr. McNearney had the right to present a defense that the statutory element was not met. Failing to allow Mr. McNearney his right to present his defense was prejudicial. The trial court's error requires this Court to reverse and remand for a new trial.

ARGUMENT

POINT I. The Trial Court Erred in Denying a Motion for a Directed Verdict to Amend the Offense to a Third Degree Burglary of a Building Where the Newly Built Structure at Issue Had Never Been Occupied and Thereby Did Not Meet the Statutory Definition of a "Dwelling."

Under Utah law, a newly built structure that has never been lived in, although constructed for the purpose of human habitation, does not fit the statutory definition of a "dwelling" within the meaning of the burglary statute. See State v. Cox, 826 P.2d 656 (Utah Ct. App. 1992); Utah Code Ann. § 76-6-201(2) (2008); Utah Code Ann. § 76-6-202(2) (2008). The term "usually occupied" used to define a "dwelling" requires that a person actually be presently occupying the house as a residence where they sleep at night, regardless if they are currently present, or that they have occupied the residence in the past with the intention of returning. Because no one had ever lived or slept in the house at issue in this case, the structure had never become and was not a "dwelling" within the meaning of the statute defining burglary in the second degree. See Utah Code Ann. § 76-

6-202(2). Therefore, the trial court erred in denying the motion for a directed verdict to amend the offense to third degree burglary of a building.

When interpreting a statute and the terms within it, this Court first looks to the plain meaning and presumes that "the legislature used each word advisedly and [will] give effect to each term according to its ordinary and accepted meaning." State v. Barrett, 2005 UT 88, ¶ 29, 127 P.3d 682 (citation omitted).

Utah Code Ann. § 76-6-202(2) states that a "[b]urglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree." Id. Utah Code Ann. § 76-6-201(2) defines a "dwelling" as "a building which is usually occupied by a person lodging in the building at night, whether or not a person is actually present. Id. (emphasis added). "The term 'usually occupied' refers to the purpose for which the structure is used." Cox, 826 P.2d at 662. To fit within the statutory definition, the structure must be "one in which people typically stay overnight." Id. A newly erected vacant house that has not yet been occupied does not meet the statutory definition of a dwelling. Rather, a structure "becomes a dwelling house when a person occupies it and begins to use it regularly for the purpose of sleeping." 3 Charles E. Torcia, Wharton's Criminal Law, §325 (15th ed. 1995) ("Wharton").

The purpose behind charging burglary of a dwelling as a more serious felony offense is "to protect people while in places where they are likely to be living and sleeping overnight, as opposed to protecting property in buildings such as stores, business offices, or garages." Cox, 826 P.2d at 662. When an individual closes their door, they should be able to feel secure in their home. "This is particularly true at night because at

that time an occupant is most vulnerable—he is usually sleeping." Wharton, supra, §325. However, the dangers the legislature sought to protect individuals from are not present to the same extent when the structure is uninhabited. Entry into a newly built vacant structure does not implicate the concerns for privacy, sanctity of home or the potential for serious harm that the burglary of a dwelling statute sought to address.

> The test for determining if [a] building is a "dwelling house" is whether "it is used regularly as a place to sleep[,]" . . . [However,] "the mere fact that a house was built for the purpose of serving as a place of human habitation, and that it is entirely suitable therefor, will not be sufficient to qualify it as a dwelling so far as the law is concerned. It is not such before the first dweller has moved in nor after the last dweller has moved out with no intention of returning . . . ."

Wallace v. State, 492 A.2d 970, 974 (Md. Ct. Spec. App. 1985) (citation omitted).

In Cox, the defendant argued that a cabin occupied less than fifty percent of the time was not a "dwelling" within the meaning of the burglary statute. Cox, 826 P.2d at 662. The cabin owner testified that although no one lived in the cabin on a daily basis he spent two to three days a week there. Id. at 658. In determining that the occasional use cabin fit within the term "usually occupied," this Court stated "[i]f the structure is one in which people typically stay overnight, it fits within the definition of dwelling under the burglary statute." Id. at 662. In support of its definition that "usually occupied" means a place where "people typically stay overnight," this Court cited the holding in a Michigan case which determined that the similar term "occupied dwelling," "included a house under construction in which the owner slept only on weekends and holidays, noting the possibility of confrontation between the owner and an intruder." Id. at 662 (citation omitted). This is because the statute "is intended to protect people while in places where

they are likely to be living and sleeping overnight." Id.; see also State v. Hale, 2006 UT App 434, No. 20050461-CA, 2006 WL 2979732, at *3 (determining a motor home fits within the statutory definition of burglary of a dwelling); State v. Cates, 2000 UT App 256, No. 990402-CA, 2000 WL 33244184, at *2 (holding a rented camping trailer equipped and used for overnight lodging fit within the statutory definition of burglary of a dwelling).

This Court's holding in Cox and subsequent decisions are in line with other states that have determined burglary is "viewed as [a crime] against habitation" and "an occupant's temporary absence does not change the character of a structure from being a dwelling house for purposes of the crime of burglary." Annotation, Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering, 20 A.L.R.4th 349, §2 (2009) [hereinafter Occupant's absence]; Hale, 2006 UT App 434 *4 (noting that second degree burglary seeks to "protect people . . .where they are likely to be living and sleeping" whereas "burglary of a vehicle [intends] to protect people's vehicles"); State v. Oakey, 2005 UT App 89, No. 20030751-CA, 2005 WL 434500, at *1 (stating Cox holding that cabin used less than fifty percent of the time fit the statutory definition of dwelling "was not dependent upon the amount of time the cabin was occupied" but focused on "the purpose for which the structure is used."). Instead, it is the occupant's intention to return to the structure, regardless of how long the absence, that determines "whether the house retains its character as a dwelling house" and whether a burglary has occurred. Occupant's absence, supra, §2.

The second degree burglary statute requires that the structure "must be occupied as a dwelling house and not merely suitable or intended for such purpose." Id.; see also Wharton, §325. This intent that the house must be occupied as a dwelling and not just suitable as such is evident in the statute's definition of "building." Utah Code Ann. §76-6-201(1). A "building" is statutorily defined in part as "any watercraft, aircraft, trailer, or other structure or vehicle adapted for overnight accommodation of persons." Id. The plain meaning of this definition is that the legislature requires more from a structure than merely being "adapted for overnight accommodation" in order for it to qualify as a "dwelling." Instead, a building becomes a "dwelling" when it is actively being occupied as such, even if just on an occasional basis. Id. But, where a vacant structure has never been occupied and does not contain those accoutrements usual to habitation, it does not fit within the statutory definition of a "dwelling."

For example, in Watson v. State, defendant was charged with burglary of an unoccupied dwelling house. 179 So.2d 826 (Miss 1965). The house in question was under construction, nearing completion. Id. at 826-27. One of the co-defendants was a carpenter who had been working on the building and told the defendant and other co-defendant that there was a power saw inside the building that they could sell. Id. at 827. The defendants entered the building and took the saw. Id. The court reversed, noting that previous state case law established that a recently built house, currently vacant, and never occupied as a dwelling house "was not a dwelling house within the meaning of the statute defining burglary of a dwelling house." Id. (citing Woods v. State, 191 So. 283 (Miss. 1939). Similarly, a nearly completed house designed for occupancy as a dwelling

but that had never been occupied as such before the saw was taken, did not meet the definition of a dwelling under the statute. Id.; see also Melton v. State, 477 So.2d 942 (Miss. 1985) (holding directed verdict should have been granted where defendants could not be convicted of burglary of a dwelling house where house under construction had not become a dwelling house where it had never been occupied).

In Johns v. Commonwealth, the defendant argued that the evidence was insufficient to support that the house he broke into was a dwelling house within the meaning of the burglary statute. 675 S.E.2d 211 (Va. Ct. App. 2009). The house in question was described as a "single family residence" and was in the process of being remodeled. Id. at 212. The owner intended to sell the home as an investment and it was currently vacant, was completely unfurnished, and had never been lived in or slept in. Id. at 214-15. Defendant broke into the home taking "a tool belt, tape measures, a framing hammer, levelers, a skill saw, and utility knives." Id. at 213. Defendant was convicted of burglary of a dwelling house and appealed arguing that the house did not qualify as a dwelling house under the statute. Id. Based on case law, the court stated that "in determining whether a residence constitutes a 'dwelling house' is whether it is used for habitation, such as sleeping and other usual activities of life, on at least an occasional basis." Id. at 214 (citing Rash v. Commonwealth, 383 S.E.2d 749, 752 (Va. Ct. App. 1989) (holding house that no one had lived in or intended to occupy occasionally was not a dwelling house)).

The court determined that given the totality of the circumstance the house was not a dwelling house. Id. at 215. There was no evidence that the house was used for

habitation, "[n]o one slept there or even used it for the other usual activities of life." Id. There was "no evidence that anyone who had used the home for habitation had any intention of resuming that use." Id. Instead, the evidence showed that the owner owned the structure "as a business investment—not for habitation. Id. at 214; see Starnes v. Commonwealth, 597 S.W.2d 614, 615 (Ky. 1980) (reasoning that house will cease to be "usually occupied" at some point after owners had moved out and did not intend to return); People v. Henry, 64 A.D.3d 804 (N.Y. App. Div. 2009) (although owner had moved out of house and listed it for sale, house maintained its dwelling status where it contained family's personal belongs); Ferrell v. State, 565 N.E.2d 1070 (Ind. 1991) (although owner had not slept in house for four months, house did not lose its status as a dwelling where owner's furniture, clothing and food were kept and he went to house everyday to pick up mail and occasionally watch television); Santistevan v. People, 494 P.2d 75 (Colo. 1972) (permanently vacated apartment was not "inhabited dwelling house" within meaning of statute); Wallace v. State, 492 A.2d 970 (Md. Ct. Spec. App. 1985) (apartment not dwelling where tenants had permanently vacated and owner had never lived nor intended to live in the apartment).

The evidence in this case established that Mr. Roberts built two homes adjacent to each other in a newly developed area—one of the homes he lived in as his residence, the other he built to sell. R. 124:29, 41. The homes were surrounded by many empty lots, and lacked fences and sidewalks. R. 124:86, 87, 88-89. Although basic appliances had been placed in the house in question, it did not contain a refrigerator. R. 124:30, 32. The house had been placed on the market about four months prior to January 2008, and had a

for sale sign in front of it. R. 124:30, 41. Although the house was designed for habitation, no evidence was presented that it had ever been occupied or slept in by the owner. The house did not contain any furniture, beds, or food or contain those accoutrements usual to habitation.

Because no one had ever occupied this home it does not meet the definition of a "dwelling" under the statute. A vacant house does not implicate the concerns for privacy, sanctity of home, or potential harm that the second degree burglary statute seeks to address. The dangers raised by the burglary of a dwelling statute are not present to the same extent when a house is uninhabited. Therefore, the trial court's interpretation of the statutory definition of "dwelling" was erroneous and it erred in denying the motion for a directed verdict to amend the offense to a third degree burglary of a building.

POINT II. The Trial Court Erred in Failing to Instruct the Jury on the Lesser Offense of Burglary of a Building Denying Mr. McNearney His Right to Present the Jury With His Theory of the Case.

Encompassed in the trial court's duty to instruct the jury on the law applicable to the facts of the case is the "right of defendant to have his theory of the case presented to the jury in a clear and understandable way." State v. Potter, 627 P.2d 75, 78 (Utah 1981); see also State v. Smith, 706 P.2d 1052, 1058 (Utah 1985). "When an accused enters a plea of not guilty, he has a right to have his entire case submitted to the [fact-finder] unless he waives such right by expressly admitting at the trial the existence of some fact or facts which is or are put in issue by the plea of not guilty." State v. Green, 6 P.2d 177, 181 (Utah 1931); Rock v. Arkansas, 483 U.S. 44, 52-53 (1987) (Defendant's collective right to present a defense is rooted in the Sixth Amendment's confrontation and

compulsory due process clauses and the Fifth Amendment's guarantee of due process); see Utah Code Ann. § 76-1-501(1) (2008). This is true "regardless of the relative strength or weakness of the evidence in the case." State v. Rosenbaum, 449 P.2d 999, 1000 (Utah 1969); see Green, 6 P.2d at 181 ("It is the sole and exclusive province of the jury to determine the facts in all criminal cases, whether the evidence offered by the state is weak or strong, is in conflict or is not controverted."). In this case, Mr. McNearney was charged with second degree burglary of a dwelling. See Utah Code Ann. § 76-6-202(2). At trial, he asked the court to provide instructions to the jury on the lesser-included offense of burglary of a building, a third degree felony. R. 69-70; 124:147-150. The trial court denied Mr. McNearney's request. R. 124:147. The trial court also denied Mr. McNearney the right to present a defense that the house in question was not a "dwelling" as defined within the burglary statute. R. 124:150-153. The trial court's rulings were error and Mr. McNearney was entitled to argue to the jury his theory of the case and have the jury instructed on the lesser included offense.

"[A] defendant is entitled to a requested lesser-included offense instruction if (1) the two offenses are related because some of their statutory elements overlap . . . ; and (2) the evidence provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting the defendant of the lesser-included offense." State v. Evans, 2001 UT 22, ¶ 18, 20 P.3d 888 (citing State v. Baker, 671 P.2d 152, 159 (Utah 1983)). Under this "evidence-based" standard, which mirrors Utah Code Ann. § 76-1-402, the trial court must give the requested lesser included offense instruction when either "there is a sufficient quantum of evidence to raise a jury question regarding a lesser offense" or

"when the evidence is ambiguous and therefore susceptible to alternative interpretations, and one alternative would permit acquittal of the greater offense and conviction of the lesser." Baker, 671 P.2d at 159; Utah Code Ann. § 76-1-402(3)-(4) (2008).

Under the first prong of this standard, this Court will consider whether the statutory elements of the two offenses overlap. See Baker, 671 P.2d at 159. "This will depend on whether there exist[s] some overlap in the statutory elements of allegedly 'included' offenses and whether "the same facts tend to prove elements of more than one statutory offense." State v. Powell, 2007 UT 9, ¶ 25, 154 P.3d 788 (internal quotation omitted) (citation omitted); Utah Code Ann. § 76-1-402(3) ("An offense is so included when: (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]"). Burglary is defined in part as follows:

> (1) An actor is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit:
> (a) a felony;
> (b) theft;
> (c) an assault on any person;
> (d) lewdness, a violation of Subsection 76-9-702(1);
> (e) sexual battery, a violation of Subsection 76-9-702(3);
> (f) lewdness involving a child, in violation of Section 76-9-702.5; or
> (g) voyeurism against a child under Subsection 76-9-702.7(2) or (5).
> (2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Utah Code Ann. § 76-6-202(1)-(2) (2008).

As illustrated by the statute above, the elements for burglary of a building and burglary of a dwelling overlap. Id. The exact elements required to be proved beyond a reasonable for burglary of a building must be proved to the same degree for the offense of

burglary of a dwelling. Id. The only distinction between the two offenses is the element regarding the type of "building" where the offense took place. Id. Because the elements of the two offenses overlap, Mr. McNearney was entitled to have the jury instructed on burglary of a building as an alternative basis for conviction.

After determining that the offense of burglary of a building is an offense "included" in the charged offense, under the second prong of the standard, this Court must decide if there is a "rational basis" for acquitting the defendant on the greater offense and convicting him of the lesser. State v. Kruger, 2000 UT 60, ¶ 13, 6 P.3d 1116. Although a trial court cannot "weigh the credibility of the evidence" in making this determination, it "must nevertheless decide whether there is 'a sufficient quantum of evidence' to send this issue to the jury." Id. ¶ 14. In doing so, the evidence and inferences drawn from it must be viewed in the light most favorable to Mr. McNearney. Id. This standard, safeguards the defendant's "right to the presumption of innocence, maintains the state's burden of proving the defendant's guilt, and reserves the responsibility of evaluating the weight and credibility of the evidence for the jury." Powell, 2007 UT 9, ¶ 27. In this case, "a sufficient quantum of evidence" existed to provide a "rational basis" to support instructing the jury on the lesser included offense of burglary of a building.

As argued above, the evidence established that the house in question was newly constructed, vacant, had never been occupied and lacked those accoutrements usual to habitation. See supra Point I. The plain meaning of the statute and case law support Mr. McNearney's defense theory that this house, under these circumstances, did not fit the

statutory definition of being "usually occupied." When viewing this evidence in the light most favorable to Mr. McNearney, sufficient evidence existed to provide a "rational basis" for acquitting him of burglary of a dwelling and convicting him of the lesser included offense. Baker, 671 P.2d at 159 (trial court must give jury lesser included offense instruction when either "there is a sufficient quantum of evidence" or "when the evidence is ambiguous and therefore susceptible to alternative interpretations"). However, after the trial court denied Mr. McNearney's request to instruct the jury on the lesser included burglary of a building, it denied defense counsel's argument that he was still entitled to argue to the jury that the house in question was not a "dwelling" as that element is defined within the statute. R. 124:150-153. The trial court determined that "[a] home is a dwelling for purposes of the statute" and would so instruct the jury. R. 124:152. In addition to being denied the right to argue the state's evidence failed to prove the element that this house was a "dwelling" beyond a reasonable doubt, the trial court erroneously denied Mr. McNearney right to a lesser included jury instruction.

Because whether the house Mr. McNearney was alleged to have entered was a "dwelling," as that term is defined within the statute, is an element of the offense that must be proved beyond a reasonable doubt, Mr. McNearney had a right to present a defense that the statutory elements were not met. See United States v. Bautista, 145 F.3d 1140, 1151 (10th Cir. 1998) ("The right to present a defense is a 'fundamental element of due process of law.'" (citation omitted)); Utah Code Ann. §76-1-501(1) (2008) ("[E]ach element of the offense charged [must be] proved beyond a reasonable doubt."); Utah Const. art. I, §10 (requiring the jury be unanimous as to every element of offense); In re

Winship, 397 U.S. 358, 364 (1970) (federal due process clause requires each element of the offense be established beyond a reasonable doubt); Green, 6 P.2d at 181 ("The provision of our State Constitution which grants accused persons the right to a trial by jury extends to each and all of the facts which must be found to be present to constitute the crime charged . . . ."). The trial court violated Mr. McNearney's right to present a defense and his right to have the jury instructed on his theory of the case.

Where sufficient evidence existed to support Mr. McNearney's requests to instruct the jury on the lesser included offense, the trial court erred in failing to give the requested instruction and in failing to allow Mr. McNearney to present his defense that the statutory element of "dwelling" was not establish, was prejudicial. The trial court's error was prejudicial. See Spillers, 2007 UT 13, ¶ 24 ("[H]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." (alteration in original)). "When an element of the crime . . . is in dispute, and the evidence is consistent with both the defendant's and the State's theory of the case, failing to instruct on the lesser included offense presumptively affects the outcome of the trial . . . [and the Court's] confidence in the verdict is undermined." Id. (omissions in original).

If the jury had been properly instructed on burglary of a building, it is likely the jury would have reached a more favorable result for Mr. McNearney, convicting him of a third degree rather than a second degree felony. The trial court's error requires this Court to reverse and remand the case for a new trial.

CONCLUSION

For the reasons set forth herein, Mr. McNearney respectfully requests that this court reverse his conviction for burglary of a dwelling, a second degree felony and enter a conviction for burglary of a building, a third degree felony. In the alternative, defendant requests a new trial.

SUBMITTED this 3 day of December, 2009.

Debra M. Nelson
SALT LAKE LEGAL DEFENDER ASSOC.
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 3 day of December, 2009.

DEBRA M. NELSON

DELIVERED this 3 day of December, 2009.

Tab A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 081900499 FS
JOEL SCOTT MCNEARNEY,	:	Judge: DENO HIMONAS
Defendant.	:	Date: May 1, 2009

PRESENT
Clerk: wendypg
Prosecutor: MAY, THADDEUS J
Defendant
Defendant's Attorney(s): HANSEEN, TAWNI

DEFENDANT INFORMATION
Date of birth: February 6, 1963
Video
Tape Number: S44 Tape Count: 4:09

CHARGES
1. BURGLARY - 2nd Degree Felony
Plea: Not Guilty - Disposition: 03/04/2009 Guilty

SENTENCE PRISON

Based on the defendant's conviction of BURGLARY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Enter, participate in, and complete any program, counseling, or treatment as directed by the Department of Adult Probation and Parole.
Good behavior - no further violations.
Submit to 6 months home confinement. Defendant may leave for employment and to aid in the care of his wife.

Case No: 081900499
Date: May 01, 2009

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120 hours community service.
Credit granted for 2 days jail previously served.
ZERO TOLERANCE

Date: 5/4/09

DENO HIMONAS
District Court Judge

STATE OF UTAH)
County of Salt Lake) ss.

I, the undersigned, Clerk of the District Court, State of Utah, Salt Lake County, Salt Lake Department do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and seal of said Court This 28 day of May 20 09

CLERK OF COURT

By K. Utley

Tab B

UTAH CODE ANN. § 76-6-202 (2008)

§ 76-6-202. Burglary

(1) An actor is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit:

(a) a felony;

(b) theft;

(c) an assault on any person;

(d) lewdness, a violation of Subsection 76-9-702(1);

(e) sexual battery, a violation of Subsection 76-9-702(3);

(f) lewdness involving a child, in violation of Section 76-9-702.5; or

(g) voyeurism against a child under Subsection 76-9-702.7(2) or (5).

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

(3) A violation of this section is a separate offense from any of the offenses listed in Subsections (1)(a) through (g), and which may be committed by the actor while he is in the building.